

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

28 Oct. 2002

IN THE MATTER OF DIVERSION OF WATER)
WITHOUT A VALID WATER RIGHT OR NOT)
IN CONFORMANCE WITH A VALID WATER)
RIGHT ON LANDS OWNED OR CONTROLLED)
BY K. MERLE AND/OR JANICE JEPPESEN)

ORDER TO SHOW CAUSE

The Department of Water Resources (department), being charged with the duties of protecting vested water rights, enforcing specific statutes of the state of Idaho and the rules promulgated by the department, and being authorized to order the cessation of violations or apparent violations of the provisions of the law relating to the appropriation, distribution and use of water, has conducted an investigation of certain diversions of water being made by or under approved transfer nos. 2034 and 3002.

Based upon the department's investigation, the department sets forth the presently known facts and applicable law as follows:

FACTS

1. Water right no. 22-265 was decreed in the case Rexburg Irrigation Co. vs. Teton Irrigation Co., dated December 16, 1910, in the Sixth Judicial District Court, Fremont County. The water right was decreed to Garn Martin for irrigation and other purposes in the amount of 480 inches (9.6 cfs) to be reduced to 240 inches (4.8 cfs) after June 20th of each year, with a source of Moody Creek and a priority date of March 15, 1879.

2. Transfer application no. 2034 was filed by K. Merle and/or Janice Jeppesen in 1976 to change the point of diversion and place of use for a portion of the right to be designated as right no. 22-265B. In 1977, the Idaho Department of Water Resources (department) approved the transfer of 4 cfs (2 cfs after June 20) to a new point of diversion and place of use upstream on Moody Creek and limited irrigation to 85 acres. One of the conditions of approval of the transfer was the requirement of a measuring device to be permanently installed and maintained as part of the diverting works.

3. Transfer application no. 3002 was filed by K. Merle and/or Janice Jeppesen in 1984 to change the point of diversion and place of use for an additional portion of the original decreed right to be designated as right no. 22-265D. In 1985, the department approved the transfer of 4 cfs (2 cfs after June 20) to a point of diversion and place of use at the same general location as approved under transfer no. 2034 and limited irrigation to 115 acres and 288 acre-feet per annum under the transfer. The approval



required a totalizing meter and lockable controlling works to be permanently installed and maintained as part of the diverting works.

4. A statutory claim (no. 22-4195) was filed by K. Merle and/or Janice Jeppesen in 1985 for irrigation of 530 acres with point of diversion and place of use at the same general location as transfer nos. 2034 and 3002. The claim lists a quantity of 4 cfs from Moody Creek with a priority date of July 15, 1965.

5. The department has received complaints and information from interested parties asserting that the use of water from Moody Creek on lands owned or controlled by K. Merle and/or Janice Jeppesen is in excess of authorized water rights and is not in compliance with the conditions of approval for transfer nos. 2034 and 3002, including the measuring device requirements. Department review of 2002 satellite imagery indicates irrigation in excess of the 200-acre limit within the place of use authorized under transfer nos. 2034 and 3002. Water was not available to fill statutory claim no. 22-4195 during the 2002 irrigation season due to drought conditions.

APPLICABLE LAW

1. Section 42-351(1), *Idaho Code*, provides as follows:

If the director of the department of water resources finds, on the basis of available information, that a person is diverting water or has diverted water from a natural watercourse or from a ground water source without having obtained a valid right to do so or is applying water or has applied water not in conformance with a valid water right, then the director of the department of water resources shall have the discretion to issue a written notice of violation to the person in accordance with the provisions of section 42-1701B, *Idaho Code*, for the illegal diversion or use of water. Notwithstanding the issuance of a notice of violation, the director may also file an action seeking injunctive relief directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right.

2. Section 42-201(1), *Idaho Code*, provides in pertinent part as follows:

All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise.

3. Section 42-1701B(6), *Idaho Code*, provides in pertinent part as follows:

(a) Any person determined in a judicial civil enforcement action to have substantially violated any provision of title 42, *Idaho Code*, or any rule promulgated pursuant to that title, shall be liable for a civil penalty not to

exceed ten thousand dollars (\$10,000) per violation or one hundred fifty dollars (\$150) per day for a continuing violation, whichever is greater; except that persons determined to be in violation of section 42-351, *Idaho Code*, shall be liable for a civil penalty not to exceed:

- (ii) For irrigation uses, three hundred dollars (\$300) annually for each acre irrigated, in whole or in part, by the illegal use or diversion.

4. Section 42-701(1), *Idaho Code*, requires appropriators or users of any public waters of the state of Idaho to maintain suitable headgates and controlling works at the point where the water is diverted. It also provides that each such appropriator shall construct and maintain an appropriate measuring device, when required by the director.

5. Diversion and use of the public waters of the state of Idaho in excess of that authorized under existing rights or not in compliance with existing water rights must be regulated to prevent injury to other water rights, to protect the water resources of the state and to assure that the allocation and use of available water supplies takes place in an orderly manner.

6. The information available to the department indicates that the use of water on lands owned or controlled by K. Merle and/or Janice Jeppesen is in excess of existing water rights and is not in compliance with conditions of approval for transfer nos. 2034 and 3002. *

ORDER

IT IS HEREBY ORDERED as follows:

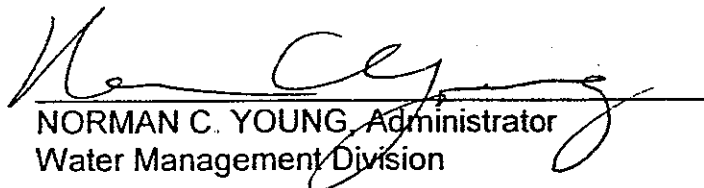
1. K. Merle and/or Janice Jeppesen shall show cause why the department should not issue a written notice of violation in accordance with the provisions of section 42-1701B, *Idaho Code*, for the illegal diversion or use of water from Moody Creek. Such explanation shall include a reporting of acres irrigated and total volume of water diverted during the current 2002 irrigation season from Moody Creek under transfer nos. 2034 and 3002 and any other water rights.

2. K. Merle and/or Janice Jeppesen shall show cause why the department should not issue an order requiring installation and maintenance of controlling works and measuring device(s) with totalizing meter for diversion(s) authorized under approval of transfer nos. 2034 and 3002 as provided in section 42-701(1), *Idaho Code*, and as required as a condition of approval for the transfers. Such explanation shall include a description of current means of control to ensure that the diversion of water is within authorized limits.

3. The information required above shall be submitted to the department by

December 2, 2002.

DATED this 28TH day of OCTOBER 2002.


NORMAN C. YOUNG, Administrator
Water Management Division

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of October, 2002 I mailed a true and correct copy, postage prepaid, of this Order to Show Cause, via U.S. Mail, postage prepaid, to the following:

K. Merle and/or Janice Jeppesen
434 Morgan
Rexburg, Idaho 83440


Victoria Wigle
Assistant to the Director



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov.

September 8, 2006

JAMES E. RISCH
Governor

KARL J. DREHER
Director

K MERLE JEPPESEN
434 MORGAN DRIVE
REXBURG ID 83440

RE: Pending Notice of Violation Potential Unauthorized Use of Water

Dear Mr. Jeppesen:

This letter seeks information about diversion and use of water from Moody Creek during the 2006 irrigation season. The purpose of the letter is to determine, based on your response and other information available to the Idaho Department of Water Resources (IDWR), whether a notice of violation should be issued for illegal use of water or use of water not in conformance with the conditions of your water rights

On January 25, 2006, I wrote a letter to the Friends of Moody Creek describing the history of your diversions of water from Moody Creek and concluding that you needed to take specific actions as directed by the watermaster. A copy of the letter was sent to you and to your attorney asking for comments. No comments were received. Some of the following are excerpts from the text of that letter. I will refer to you and your family in this letter as "Jeppesens."

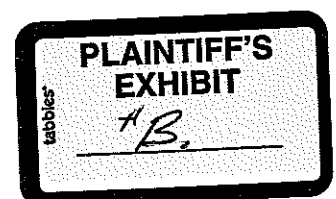
Summary of Water Rights

Water right no. 22-265 was decreed in 1910 in the case of *Rexburg Irrigation Co v. Teton Irrigation Co.* The right authorized diversion of 9.6 cfs from Moody Creek from April 1 to June 20, and 4.8 cfs from June 21 to November 1. IDWR approved two transfers allowing diversion of water from Moody Creek by Jeppesens.

Transfer no. 2034

In 1977, transfer no. 2034 transferred a portion of water right no. 22-265 to 85 acres of land owned by Jeppesens. The approved transfer authorized an upstream change in the point of diversion on Moody Creek to Jeppesens' pumps and a change in the place of use. The transfer authorized diversion of 4.0 cfs from April 1 to June 20 and 2.0 cfs from June 21 to November 1.

The approved transfer required installation of a measuring device approved by IDWR and limited the irrigation to 85 acres. The transfer did not limit the annual volume. The transfer stated that the 85 irrigated acres would be rotated within a 320-acre place of use.



Application for Transfer no. 3002

In 1984, another portion of water right no. 22-265 was transferred by transfer no. 3002 to 115 acres of land owned by Jeppesens. The approved transfer again authorized an upstream change in the point of diversion on Moody Creek to the Jeppesens' pumps and a change in the place of use. The transfer authorized the diversion of an additional 4.0 cfs from April 1 to June 20 and 2.0 cfs from June 21 to November 1.

The 115 acres could be irrigated within a larger 515-acre place of use. The annual volume of diverted water was limited to 288 acre-feet. The water right holder was required to install a totalizing meter and lockable controlling works.

Interpretation of the Transfers

Based on IDWR's past interpretations, Jeppesens have the authority to divert up to 8.0 cfs from April 1 to June 20 and 4.0 cfs from June 21 to November 1 under the two transferred portions of water right no. 22-265.

Transfer no. 2034 did not determine an annual volume of water for irrigation of the 85-acre place of use. Transfer no. 3002 limited the annual volume to 288 acre-feet for irrigation of the 115-acre place of use. Both transfers identified a fixed number of acres that could be irrigated within a larger block of irrigated land, presumably the 515 acres identified in transfer no. 3002. Both transfers required installation of a measuring device acceptable to IDWR.

Claim No. 22-4195

Statutory claim no. 22-4195, filed by K. Merle Jeppesen, asserts the perfection of a water right by beneficial use of water diverted from Moody Creek. The claim asserts the right to divert 4.0 cfs of water from Moody Creek for the irrigation of 530 acres. Merle Jeppesen asserts that the water was beneficially used as claimed on July 15, 1965.

Merle Jeppesen also filed a parallel beneficial use claim for 22-4195 in the Snake River Basin Adjudication (SRBA). SRBA claim no. 22-4195 has not been decreed by the SRBA Court.

Claim no. 22-4195 is one of the first water rights shut off by the watermaster during regulation because it bears a very late priority date and because beneficial use claims are delivered last during regulation.

Claim No. 22-594

SRBA claim no. 22-594 identifies Jeppesens' pumps on Moody Creek as points of diversion for a water right held by Woodmansee-Johnson Canal Company. Woodmansee-Johnson water was not delivered to Jeppesens' point of diversion in recent years and has not been delivered to Jeppesens' point of diversion in 2006.

Activities Prior to 2006

Following the approval of the above-discussed transfers and filing of statutory claim no. 22-4195, controversy about Jeppesens' diversion has stirred for almost two decades. An Order to Show Cause was issued to Jeppesens on October 28, 2002, directing K. Merle and/or Janice Jeppesen to show cause why IDWR should not issue a notice of violation for illegal use of water. In the settlement of the violation, the requirement for installation of adequate measuring devices was reiterated.

Past Administration by Water District no. 01

An August 18, 2003, memo, written by Ryan Madsen, states that Jeppesens installed a Grainland meter and a data logger, but it was unreliable. The memo states that the flow meter would not read accurately, and that Jeppesens attempted to recalibrate the meter several times. In the last paragraph of the memo, Madsen states:

Because the transfer conditions are so confusing, regulating more than the rate of diversion is difficult, even though there appears to be both a volume limit and an acreage limit on the transfer. Since the right Jeppesen has is the oldest water right in Water District 1, the right will never be cut, based strictly on priority. It appears that the authorized rate of diversion will never be exceeded by the Jeppesen pumps. *NO new restrictions*

Both transfers approved for Jeppesens' diversion require measurement of the water diverted. Both transfers also limit acreage irrigated.

Measuring Devices

Originally, Jeppesens installed a Grainland meter. As stated before, information in the file indicates that measurements of flow with the Grainland meter have been unreliable. At the end of the summer of 2005, Jeppesens installed a mechanical meter in the mainline. IDWR discovered that the flow meter did not measure both flow rate and total volume.

Merle Jeppesen
September 8, 2006
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The January 25, 2006, letter stated that Jeppesens must install a reliable, in-field calibrated measuring device that will accurately accumulate volume diverted and read instantaneous flow rate.

On July 23, 2006, Jeppesens installed an in-line flow meter that will read both flow and accumulate total volume pumped.

Measurement During 2006 Irrigation Season

Jeppesens submitted a pump card to Water District 01 after every month of the 2006 irrigation season as of the date of this letter. The pump cards contained diversion information for the entire previous month. Jeppesens were solely responsible for estimating diversions, recording the information, and reporting. The values on the pump cards were not determined from a measuring device until a measuring device was installed at the end of July 2006.

Other 2006 Activities

Jeppesens identified three 160-acre parcels within which they would irrigate the 200 acres authorized by water right no. 22-265. The specific acres were not identified.

In 2006, Ryan Madsen delivered Moody Creek water to Jeppesens as authorized by their portion of water right no. 22-265 and as claimed by statutory claim no. 22-4195. Water was not delivered to Jeppesens under water right no. 22-594 because Water District 01 had not previously delivered the water right at the Jeppesen pumps.

On June 21, 2006, water right no. 22-265 was no longer deliverable. After June 21, 2006 only 200 acres could be irrigated.

On June 26, 2006, Jeppesens paid Fremont Irrigation District for the rental of 110 acre-feet of storage water from the irrigation district. Jeppesens intended to have the storage water delivered through the Cross-Cut Canal, and discharged into Teton River to compensate for their upstream withdrawals from Moody Creek, a tributary of the Teton River. During the four-day period before the storage was rented, Jeppesens irrigated lands in excess of the 200 acres identified. Jeppesens continued to irrigate in excess of 200 acres during July with water from Moody Creek, assuming that the rented storage water would justify the diversion and use. Jeppesens did not apply for an exchange of water as required by Idaho Code § 42-240.

Half of a circular pivot owned by Jeppesens is described as a place of use by Jeppesens' surface water filings. The other half of the circular pivot is the place of use for a ground water right. The mainline for the ground water delivery is connected to the surface water delivery system. As a result, surface water could be used on lands authorized as a place of use for only a ground water right.

*no mixing surface
ground water!!*

Conclusion

Based on the above facts, I conclude the following:

1. Water diverted from Moody Creek pursuant to Jeppesens' portion of water right no. 22-265 irrigated more than 200 acres after water could no longer be diverted under claim number 22-4195. Irrigation of more than 200 acres with water diverted pursuant to 22-265 is a violation of the conditions of the water right.
2. Jeppesens diverted water from Moody Creek under water right no. 22-265 without a measuring device approved by the Department. Diversion without measurement is a violation of the conditions of the water right.
3. Jeppesens diverted Moody Creek water for irrigation in exchange for storage that was to have been delivered through the Cross Cut Canal to the Teton River. Idaho Code § 42-240 requires that an exchange be approved by IDWR prior to exchanging a water right (or storage) with natural flow in the river.

This letter requests your input regarding the three conclusions stated above.

Please respond to this office in writing, within 14 days of the date of this letter, with any information related to the three above-stated conclusions about your 2006 water use. Please note that diversion and use of water in Idaho without a valid water right, or not in conformance with a water right, is illegal and may result in a notice of violation pursuant to Idaho Code § 42-351. Pursuant to Idaho Code § 42-1701B, IDWR may assess civil penalties for illegal irrigation use of up to \$300 annually for each acre irrigated, in whole or in part, by the illegal use or diversion.

If you have questions regarding this matter please contact me directly at (208) 287-4943.

Sincerely,



Gary Spackman

Jerry Rigby
Lyle Swank
Ryan Madsen
✓ George Brown
James Wood

- ① A minimum flow has been measured @ Steve Woods. Jeppesen has not pumped enough water to lower this flow except perhaps in 2001 when creek was pumped dry.
- ② No one has documented how much water Jeppesen removed from Muddy Creek or how many acres were irrigated using Muddy Creek water. His irrigation system connects to both surface and deep groundwater sources.



IDAHO DEPARTMENT OF FISH AND GAME

600 S. Walnut/P.O. Box 25
Boise, Idaho 83707

February 13, 2007

C L "Butch" Otter/Governor
Cal Groen/Director

Mr. George Brown, M.D.
814 Northpoint Drive
Salt Lake City, UT 84103

Dear Dr. Brown:

The Idaho Department of Fish and Game (Department) received your e-mail on February 5th regarding Moody Creek, and the intent of the Friends of Moody Creek to restore a minimum stream flow.

Moody Creek was a historically important spawning and rearing stream for Yellowstone cutthroat trout (YCT) in the lower Teton River. Yellowstone cutthroat trout have experienced reductions in their historic range and the Idaho Comprehensive Wildlife Conservation Strategy (CWCS, IDFG 2005) currently lists YCT as a species of greatest conservation need. The CWCS identifies habitat fragmentation and isolation of existing populations as principle issues facing YCT. We noted in our February 2, 2006 letter to you that we understand Mr. Jeppesen's existing water right may result in complete dewatering of the stream at his diversion during drought conditions. Depending on the timing and duration of the dewatering event, the upstream and/or downstream migration of fish may be adversely impacted. We believe the Department's original efforts in 1984 to develop a Memorandum of Understanding (MOU) with Mr. Jeppesen and our recent efforts to find a collaborative solution through the Henrys Fork Watershed Council demonstrate our recognition of the value of the cutthroat trout population in Moody Creek and the impacts dewatering the stream has on the population.

We believe establishment of a minimum flow in Moody Creek to allow fish passage is crucial to protect the existing Yellowstone cutthroat trout and restore spawning runs to their historical habitat, particularly during periods of drought. The Department is the

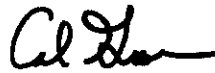


Keeping Idaho's Wildlife Heritage

Mr. George Brown, M.D.
February 13, 2007
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state agency entrusted with the statutory authority to preserve, protect, and perpetuate the wildlife and fisheries resources of the State of Idaho (IC §36-103). We remain committed to work with all parties, within the framework of existing statutes, to develop an agreement to establish a minimum flow regime that will provide adequate passage for Yellowstone cutthroat trout in Moody Creek.

Sincerely,



Cal Groen
Director

Literature Cited

Idaho Department of Fish and Game. 2005. Idaho Comprehensive Wildlife Conservation Strategy. Idaho Conservation Data Center, Idaho Department of Fish and Game, Boise, ID. <http://fishandgame.idaho.gov/cms/tech/CDC/cwcs.cfm>

c.s. Joyce Edlefsen